

1 On August 30, 2011, the court granted plaintiff's motion for a
2 temporary restraining order in limited part and denied it in all
3 other respects. The order enjoined defendants from striking horses
4 with the skids of helicopters and from flying any part of a
5 helicopter dangerously or unreasonably close to horses during the
6 remainder of the first phase of the roundup at the Triple B
7 Complex. When the first phase ended the following day, the
8 temporary restraining order expired.

9 On September 8, 2011, the plaintiff filed a first amended
10 complaint. In the amended complaint, plaintiff expanded her
11 allegations to include the allegedly inhumane and illegal conduct
12 in all future roundups within the District of Nevada, not just
13 those in the Triple B Complex.

14 On January 26, 2012, the court conducted a hearing on the
15 motion for a preliminary injunction. The court denied the motion
16 on the grounds that plaintiff could not show an immediate threat of
17 irreparable harm.

18 On February 14, 2012, the Ninth Circuit Court of Appeals
19 issued a decision in *Leigh v. Salazar*, 668 F.3d 1126 (9th Cir.
20 2012), *amended and superseded by Leigh v. Salazar*, 892 F.3d 892
21 (9th Cir. 2012). The plaintiff now moves for reconsideration in
22 light of the court's holding in that case. The defendants respond
23 that the motion is untimely, the motion is frivolous and without
24 support, and plaintiff failed to justify the need for emergency
25 injunctive relief.¹

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27 ¹ The defendants also argued that the motion was premature because the
28 Ninth Circuit decision in *Leigh* was not yet final at the time plaintiff
filed her motion for reconsideration. With the issuance of the mandate,
however, that decision is now final and remains binding unless and until

1 While a motion for reconsideration that seeks only to
2 relitigate the issues underlying a court's preliminary injunction
3 order must be filed within 28 days of the order, a motion based on
4 changed circumstances may be filed any time before the entry of
5 judgment. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d
6 1119, 1124 (9th Cir. 2005). Because the Ninth Circuit issued an
7 opinion bearing on this court's analysis of the plaintiff's motion
8 for preliminary injunction after the court denied the motion,
9 plaintiff's motion for reconsideration is timely filed.

10 Absent highly unusual circumstances, the court should grant a
11 motion for reconsideration only where: (1) it is presented with
12 newly discovered evidence; (2) it has committed clear error or the
13 initial decision was manifestly unjust; or (3) there has been an
14 intervening change in controlling law. *Nunes v. Ashcroft*, 375 F.3d
15 805, 807 (9th Cir. 2004); *Kona Enters., Inc. v. Estate of Bishop*,
16 229 F.3d 877, 890 (9th Cir. 2000); *Sch. Dist. No. 1J, Multnomah*
17 *County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

18 Plaintiff bases her motion for reconsideration on an
19 intervening change in controlling law. In denying the plaintiff's
20 motion for a preliminary injunction, the court held, in part, that
21 plaintiff had not shown a likelihood of irreparable harm because
22 there were no immediate plans for defendants to conduct more
23 roundups in the Triple B Complex. Thereafter, the Ninth Circuit
24 issued its opinion in *Leigh*, which held, in relevant part, that the
25 motion for a preliminary injunction in that case was not moot.
26 *Leigh*, 892 F.3d at 897. Although plaintiff recognizes that

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28 reversed by the United States Supreme Court.

1 mootness is a separate inquiry from irreparable harm, she argues
2 that the Ninth Circuit's holding on mootness informs the analysis
3 of irreparable harm.

4 The court agrees that the Ninth Circuit's decision in *Leigh*
5 impacts its preliminary injunction order in this case, most
6 directly with respect to the question of mootness. Although the
7 court did not issue a final decision as to whether plaintiff's
8 motion was moot, *Leigh* quite clearly dictates the answer. So long
9 as there remain excess horses in the Triple B Complex and the
10 defendants are authorized to return for further roundups, and so
11 long as objectionable conduct is capable of repetition, the
12 plaintiff's motion for a preliminary injunction is not moot.

13 The court further agrees that *Leigh* bears on its finding with
14 respect to the likelihood of irreparable harm, and the court will
15 therefore reconsider the plaintiff's motion in light of that case.
16 As the court has limited plaintiff's complaint to roundups within
17 the Triple B Complex, the court's reconsideration of the
18 preliminary injunction motion will be similarly limited.²

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20 ² The motion for a temporary restraining order and the complaint were
21 confined to the roundup in the Triple B Complex. In her motion for
22 preliminary injunction and amended complaint, plaintiff broadens her
23 allegations to future and ongoing roundups within the state of Nevada but
24 outside of the Triple B Complex. At the hearing on the motion for
preliminary injunction, the court indicated that it would limit plaintiff's
action to roundups in the Triple B Complex. Although the plaintiff has not
moved the court to reconsider its decision in this regard, the court takes
this opportunity to clarify its decision.

25 "In determining federal court jurisdiction, [the court looks] to the
26 original, rather than to the amended, complaint. Subject matter jurisdiction
27 must exist as of the time the action is commenced." *Morongo Band of Mission
Indians v. Calif. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.
1988).

28 Plaintiff brings her action under the Administrative Procedures Act
("APA"), 5 U.S.C. § 704. Section 704 provides for judicial review of

1 In order to obtain a preliminary injunction, the plaintiff
2 must show: (1) she will probably prevail on the merits; (2) she
3 will likely suffer irreparable injury if relief is denied; (3) the
4 balance of equities tips in her favor; and (4) an injunction is in
5 the public interest. *Winter v. Natural Res. Defense Council, Inc.*,
6 555 U.S. 7, 20 (2008). Alternatively, an injunction may issue
7 under the "sliding scale" approach if there are serious questions
8 going to the merits and the balance of hardships tips sharply in

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10 "[a]gency action made reviewable by statute and final agency action for
11 which there is no other adequate remedy in a court." Because there is no
12 statute providing for judicial review of the defendants' actions in this
13 case, the actions challenged must be final. *Ukiah Valley Med. Ctr. v. Fed.*
Trade Comm'n, 911 F.2d 261, 264 n.1 (9th Cir. 1990). Finality is thus a
jurisdictional requirement. *Id.*

14 Final agency action is that which marks "the 'consummation' of the
15 agency's decision making process - it must not be of a merely tentative or
16 interlocutory nature . . . [and is] one by which 'rights or obligations have
17 been determined,' or from which 'legal consequences will flow.'" *Bennett*
v. Spear, 520 U.S. 154, 177-78 (1997). "[T]he Supreme Court has defined
18 a nonfinal agency order as one that does not itself adversely affect
complainant but only affects his rights adversely on the contingency of
future administrative action." *Nat'l Parks Conservation Ass'n v. Norton*,
324 F.3d 1229, 1237 (11th Cir. 2003).

19 At the time plaintiff filed her complaint in this matter, the only
20 final agency action that she alleged was the decision to round up horses in
the Triple B Complex. All other future, unspecified roundups in the state
21 of Nevada were or are contingent on future administrative action, to wit,
the issuance of an Environmental Assessment and Decision Record.
22 Accordingly, the future roundups challenged by plaintiff were, at the time
she filed her complaint, not final agency action. The court therefore lacks
jurisdiction to consider such challenges.

23 For the same reason, plaintiff's challenge to future roundups is not
24 ripe. A claim is not ripe if it rests on contingent future events that may
not occur as anticipated, or indeed may not occur at all. *Texas v. United*
States, 523 U.S. 296, 300 (1998). The occurrence of future gathers and
25 whether Sun-J will be employed to conduct such is at this point, and was at
the point that plaintiff filed her complaint, contingent on future events
26 that might not occur as anticipated. The claims as to those future gathers
were therefore not ripe at the time plaintiff filed her complaint, and she
27 may not assert them in this action. "If a claim is unripe, federal courts
lack subject matter jurisdiction and the complaint must be dismissed." *S.*
Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990).
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1 plaintiff's favor, so long as plaintiff still shows a likelihood of
2 irreparable injury and that an injunction is in the public
3 interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
4 1127, 1134-35 (9th Cir. 2011).

5 "An injunction is a matter of equitable discretion and is an
6 extraordinary remedy that may only be awarded upon a clear showing
7 that the plaintiff is entitled to such relief." *Earth Island Inst.*
8 *v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (internal quotation
9 marks omitted).

10 A. Irreparable Harm

11 At the hearing on the motion for preliminary injunction, the
12 court concluded that for several reasons plaintiff failed to show a
13 likelihood of irreparable harm. First, the defendants had no
14 immediate plans to return to Triple B for more gathers, so it was
15 therefore likely this case would be decided on its merits before
16 any further possible harm could befall plaintiff. Second, Sun-J,
17 the only contractor alleged by plaintiff to be engaging in inhumane
18 conduct, was not currently contracted to do any further roundups in
19 the Triple B Complex. Third, the defendants had taken positive
20 steps to address the issues raised in plaintiff's motion for a
21 preliminary injunction, including a review of the practices used
22 during roundups, the release of a report on the findings, and the
23 drafting of specific instructions for each roundup.

24 The plaintiff's motion for a preliminary injunction in *Leigh*
25 sought relief with regard to all roundups in the Silver King HMA.
26 Although the defendants had completed a roundup in the Silver King
27 HMA and stated that they had no immediate plans to return, the
28 Ninth Circuit held that there was a "real possibility" further

1 roundups would be conducted because: (1) the BLM is required to
2 immediately remove excess horses; (2) the BLM had not gathered the
3 total number of horses it had determined were excess before it
4 completed the roundup; (3) the horse population was estimated to
5 grow 20 to 25 percent annually in the Silver King HMA; and (4) the
6 Environmental Assessment ("EA") authorizing the roundup also
7 authorized the defendants to return for further roundups through
8 2013. *Leigh*, 677 F.3d at 896. Because there was a real
9 possibility of further gathers in the Silver King HMA, the Ninth
10 Circuit held the preliminary injunction motion was not moot. *Id.*
11 at 897.

12 As in *Leigh*, the BLM's return to the Triple B Complex for
13 further roundups is entirely possible because excess wild horses
14 either remain there or will be present there at some future time,
15 and the BLM is authorized to return to the Triple B Complex through
16 September 2012. The Ninth Circuit's decision in *Leigh* to remand
17 for further consideration of the preliminary injunction motion
18 suggests that the lack of immediate plans to pursue further
19 roundups does not negate a finding of irreparable harm, at least
20 where an EA authorizing the roundup is still in effect, as is the
21 case here.

22 *Leigh* does not, however, impact the court's other reasons for
23 denying the injunction. For the reasons previously articulated by
24 the court at the hearing on January 26, 2012, the court concludes
25 that plaintiff has failed to show a likelihood of irreparable harm
26 if a preliminary injunction is not issued, except to the extent
27 addressed in the court's temporary restraining order.
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1 B. Likelihood of Success on the Merits

2 Plaintiff brings her claims pursuant to the Administrative
3 Procedures Act ("APA") and the Wild Free-Roaming Horses and Burros
4 Act ("Wild Horse Act"). Plaintiff asserts that defendants have
5 violated the Wild Horse Act, accompanying regulations, and their
6 own rules, and that their actions may thus be reviewed under the
7 APA.

8 Even assuming plaintiff's claim is cognizable under the APA,
9 the court is not persuaded that plaintiff is likely to succeed on
10 the merits of her claim except to the extent it alleges inhumane
11 treatment of the horses when helicopters fly dangerously close to
12 the animals. At the hearing on the motion for temporary
13 restraining order, the court found insufficient evidence to support
14 most of plaintiff's claims of inhumane treatment. The conduct the
15 court found inhumane was addressed by the issuance of a temporary
16 restraining order. Accordingly, the plaintiff is not likely to
17 succeed on the merits of her claim for declaratory and injunctive
18 relief except to the extent addressed in the court's temporary
19 restraining order.

20 C. Balance of Hardships

21 Because plaintiff seeks only to stop inhumane treatment of
22 horses during the roundups, and not stop the roundups altogether,
23 the balance of hardships tips in her favor. Defendants could still
24 conduct the roundups without engaging in prohibited conduct.

25 D. Public Interest

26 In light of the purpose behind the Wild Horse Act and the
27 explicit statutory directive to humanely round up excess wild
28 horses, the public interest would favor the cessation of any

1 inhumane gather techniques.

2 For the reasons the court has previously articulated at the
3 hearing on the motion for a preliminary injunction, plaintiff has
4 failed to show that a preliminary injunction should issue to avoid
5 irreparable harm as to plaintiff's claims, except to the extent
6 addressed in the temporary restraining order previously issued by
7 the court. In light of the Ninth Circuit's decision in *Leigh* on
8 the issue of mootness, the court, as it did with the issuance of
9 the temporary restraining order, now enjoins and restrains the
10 defendants and their agents from flying helicopters dangerously or
11 unreasonably close to the wild horses during any roundup at the
12 Triple B complex pursuant to defendants' May 17, 2011 final
13 environmental assessment and decision for the complex. In
14 accordance with Rule 65(c), the plaintiff shall post security in
15 the amount of \$100.00. In all other respects, the court reaffirms
16 its denial of the plaintiff's motion for a preliminary injunction.
17 Therefore, plaintiff's motion for reconsideration (#35) is **DENIED**
18 except as hereabove set forth.

19 **IT IS SO ORDERED.**

20 DATED: This 21st day of June, 2012.

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23 UNITED STATES DISTRICT JUDGE
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